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United States of America

In the

Supreme Court of the United States

OCTOBER TERM, 1944

No. 577

JOE BOMMARITO, ED CARLTON LACY, SAUL KOHN, EDWARD GODDERMAN WEISBERG,
Petitioners,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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INDEX

INDEX TO AUTHORITIES CITED

Statutes and Constitution

Cases

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COUNTER-STATEMENT OF MATTERS INVOLVED

The opinion filed by the Michigan Supreme Court in the instant case, 309 Mich. 139, rather fully sets forth the statement of matters involved. Respondents point out that petitioners' description of the information filed is not absolutely accurate. It charged conspiracy to violate various sub-sections and subdivisions of the State anti-gaming laws, not divided numerically into separate counts, but charged either as one agreement directed towards a series of illegal objects or a series of continuing agreements to that end. All were con-

cerned with violations of Act 328 of the Public Acts of 1931, commonly known as the Michigan Penal Code, and all were found guilty.

FIRST FEDERAL QUESTION

Petitioners claim the right to appeal to this Court, because of the admission of testimony and exhibits procured through searches and seizures conducted at 1431 Broadway in the City of Detroit by officers of the Detroit Police Department. It is respondents' position that this presents no grounds for Federal review. The description of what occurred appears rather fully in the Court's opinion, page 143. We add that the testimony showed a series of three observations by Officer O'Brien, who testified as an expert in the investigation of gambling activities and was then investigating a gambling conspiracy. The opinion of the court giving the reasons for the decision on this point appears, pages 144 and 145, through the first paragraph of 145. Respondents add that the reasonable suspicion of the police officers who were investigating was confirmed by what they saw, that the arrest as the court held was proper, and that under Michigan and other decisions, a search of the persons arrested and the premises to which the officers had access was not only proper but mandatory. *People vs. Cona,* 180 Mich. 641, cited with approval in *People vs. Davis,* 247 Mich. 536; *People vs. Harris,* 300 Mich. 463. Moreover, the search of the safes was by virtue of a search warrant duly obtained.

The record shows no basis of objection to the warrant or the affidavit, other than petitioners' claim that it came after arrest, which is no legal ground for ob-

jection. Petitioners cited and cite no authority for such objection; neither the affidavit nor the warrant are part of the record.

The court's opinion and respondents' additions here are the factual opposition to petitioners' claim under the first federal question.

SECOND FEDERAL QUESTION

Petitioners claim that the admission of the testimony of prior convictions was a violation of their constitutional rights under the Federal Fifth Constitutional Amendment, as secured by the Fourteenth Amendment. At the trial they contended that this was lack of due process. The addition of a claim of violation of the Fifth Amendment is new. That question was not raised in the trial court, nor on the petition for re-hearing after conviction was affirmed. The trial court's position on this subject is embodied in paragraph 2, page 145, of opinion:

> "Appellants also urge that the court erred in admitting evidence as to prior convictions. The general rule is that such testimony is inadmissible to establish the guilt of defendants (fol. 148) as to other distinct and independent crimes, but such testimony is admissible to establish intent. 3 Comp. Laws 1929, Sec. 17320 (Stat. Ann. 28.1050), and authorities cited in *People vs. Hopper*, 274 Mich. 418. Nor was the admission of exhibits used in previous convictions erroneous as showing intent."

Petitioners insist that the state court's interpretation of the statute is in violation of due process. Respondents dispute such averment.

THIRD FEDERAL QUESTION

Petitioners also urge lack of due process in the denial by the trial court of their motion to quash and in the affirmance by the Supreme Court of conviction on all counts. The counts, which were actually not separate counts, but subdivisions of one information charging conspiracy, were neither duplicitous nor inconsistent, bearing in mind that it was not the overt acts, but the agreement which was the essence of the conspiracy. All Michigan decisions hold that the agreement itself is the offense. The Michigan Court here passed upon the question of Michigan pleadings, a matter not believed to be a subject for review in the Federal Court, *United States vs. Hurtado,* 110 U. S. 516, in the absence of lack of due process not here indicated.

FOURTH FEDERAL QUESTION

Under this head, petitioners merely repeat and include the allegations of error set up under the first three alleged federal questions.

ARGUMENT

Jurisdiction

It is the position of respondents that the alleged violation of the Federal Constitution here asserted on the record does not make out a case for review by the United States Supreme Court. Respondents insist that the record presents no basis for assumption of jurisdiction, to review the action of the Michigan Supreme Court.

Jurisdiction is asserted by petitioners under Section 237-b of the Judicial Code, as amended (U. S. C. A. Title 28, Sec. 344 [b]). Here they say is drawn in question the validity of the State statute on the ground of its repugnancy to the Federal Constitution, as well as its alleged repugnancy to the State Constitution. The statute which petitioners assert to be involved is Section 17320, Compiled Laws of Michigan for 1929 (Mich. Stat. Ann. 28.1050), which reads:

> "In any criminal case where the defendant's motive, intent, the absence of mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of mistake or accident on his part, or the defendant's scheme, plan or system in doing the act in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by defendant."

Respondents concede that petitioners freely and repetitiously did claim violations of their constitutional

rights under the Federal Constitution, but deny that any such violations were here involved.

To support their claim of jurisdiction, petitioners cite *Lisenba vs. California,* 314 U. S. 219, 86 L. Ed. 173, wherein the certification of the California Appellate Court affirmatively showed:

> "The decision denying rehearing is to be interpreted and considered as holding against appellant's contention that his rights under the Fourteenth Amendment to the Federal Constitution were violated."

The United States Court accepted that certificate as sufficient to indicate jurisdiction to review some but not all of the asserted phases of lack of due process, notably the allegation that the confession used had been extorted and was involuntary. The State Court was affirmed. However, the Federal Court definitely declined to review the California Court's decision that lack of federal due process was improperly denied by the admission of testimony of prior similar acts.

> "The Federal Constitution requirement of due process is not denied in a prosecution of a husband for the murder of his wife on whose life he had obtained insurance in his favor, by admitting testimony indicating that he had murdered his former wife whose life was also insured in his favor, where the state courts have upheld the relevancy of such testimony."

The decision in the Lisenba case actually upholds the Michigan Supreme Court decision and negatives petitioners' assertion thereunder.

Petitioners likewise in their assertion of jurisdiction cite *Whitney vs. U. S.* 274 U. S. 357, wherein the state

court's certificate of federal questions involved did not appear affirmatively in the record, but the parties stipulated thereto. All that this case does is to show that a court certificate may be based on stipulation instead of upon the record. It does not, however, support any of petitioners' averments of jurisdiction, since it dealt directly only with a lack of due process which rendered unconstitutional a state statute. Petitioners here do not deny the constitutionality of the Michigan statute; they merely object to the court's interpretation of that statute.

Under this head, petitioners' third citation is *Buchalter vs. New York,* 319 U. S. 427, wherein defendants sought certiorari to review state conviction by reason of alleged infringement of federal constitutional rights. The supreme court opinion recited that federal questions were *necessarily* decided. The Supreme Court accepted and reviewed the case on the theory that,

> "The due process clause of thhe Fourteenth Amendment requires that action of a state through any of its agencies must be consistent with the fundamental principles of liberty and justice, which lie at the base of our political institutions, not infrequently designated as the law of the land."

However, the court added:

> "But the amendment does not draw to itself the provisions of state constitutions or state laws. It leaves the states free to enforce the criminal laws under such statutory provisions and common-law doctrines as they deem appropriate and does not permit a person to bring to the test of a decision of this court every ruling made in the course of a trial by a state court."

This case, too, respondents point out, negatives the propriety of the assumption of jurisdiction in the instant case, while the first case cited affirmatively, passes upon the very question raised by petitioners here and rules against him. And the second case merely upholds the supreme court's right to test the constitutionality of the state statute as repugnant to the federal question, a question not here involved.

First Federal Question

The constitutional rights of petitioners under the Fourth Amendment to the Federal Constitution as secured by the Fourteenth Amendment were not here violated. Petitioners assert to the contrary, and cite cases believed to sustain jurisdiction. They assert that Officer O'Brien's entry into 1431 Broadway was by what they call deceit, and the evidence, therefore, inadmissible under the Fourth Amendment. In support of their assertions, they cite cases which involve alleged illegal searches and seizures by federal officers. Because of the fact that these searches are by federal officers, respondents point out that the cases are wholly inapplicable here. All the cases cited by petitioners come under the same head of federal searches. Respondents are particularly interested in petitioners' citation of *Weeks vs. United States,* 232 U. S. 383, 58 L., Ed. 652. There the United States Court reviewed defendant's conviction in a federal court of using the mails to defraud. The question of federal jurisdiction to review state court action was not in question. Defendant asserted, among other claims, violation of his constitutional immunity against unreasonable search and seizure as afforded by the Fourth Amendment. The court found that his rights had been violated. The

case, however, expressly refutes petitioners' contention. We quote syllabus 2:

> "Protection against individual misconduct of police officers not acting under any claim of federal authority, is not afforded by the guarantee of the United States Constitution Fourth Amendment, of immunity from unreasonable searches and seizures. *But the limitations of such amendment reach only the federal government and its agents.*"

This, of course, is directly in point under petitioners' first federal question, and definitely settles the question by showing that it presents no grounds for review.

Under the same head petitioners cite *Fraternal Order of Eagles vs. United States,* 57 Fed. (2d) 93, 94. Again, the search held illegal was conducted by Federal agents, and the case, therefore, fails to sustain petitioners. Respondents add that it has long been well settled that the Fourth Amendment to the National Constitution is a limitation upon federal but not upon state powers. The same is true of the first eight amendments, except in instances where the violation may amount to lack of due process. No federal decision, however, permits review of state search on such ground.

Petitioners go on and object to the evidence obtained by what they claim to have been an invalid search warrant. This, too, is a case for a state, not for federal decision. Moreover, no reason for invalidity was urged by petitioners except their claim that the search warrant was issued after arrest. They present no authority for their claim that this makes a search warrant illegal, and respondents find none. Logically, it is no reason to object, since the search warrant is directed against a place and not against an individual, except incidentally. So that the fact of the individual's arrest

or non-arrest does not affect the right to search granted by the warrant.

That constitutional provisions forbidding unreasonable searches and seizures refer only to the acts of the federal government is now well settled. The cases even go far enough to sustain alleged violation by local officers and permit the use of the testimony in federal cases where the two sets of officers were cooperating. A typical decision to that effect is *United States vs. One Ox-5 American Eagle Airplane,* 38 Fed. (2d) 106; c. f. also *Kitt vs. United States,* 132 Fed. (2d) 920.

Petitioners continue (page 17, Brief) their claim that the rights of citizens to be secured from violation by the State of the Fourth Amendment is guaranteed by the Fourteenth Amendment. This, of course, is refuted by their own citations and the other citations above. They cite also *Hague vs. C. I. O.,* 101 Fed. (2d) 774, 307 U. S. 496, 83 L. Ed. 1423. However, that case too originated in the Federal courts. It was a charge of conspiracy to deprive petitioners of their constitutional rights of free speech, and it was a civil case brought under a specific federal statute authorizing such suits and injunctions. It has no bearing upon the applicability of the Fourteenth Amendment to State decisions concerning the reasonableness of searches and seizures. Petitioners cite also *Grosjean vs. American Press Company,* 297 U. S. 233, 80 L. Ed. 660, which case deals with the power of states and municipalities to enact legislation allegedly contravening the Fourteenth Amendment. That question is not claimed to be here involved.

Second Federal Question

Here petitioners assert the alleged violation of their rights under the Fifth Amendment as secured by the Fourteenth. The question of the violation of the Fifth Amendment was actually not raised in the Michigan courts at all. As petitioners themselves admit (brief, page 21, last paragraph) that while the specific question was not raised either at the trial or on appeal to the Supreme Court, that was "because it was not anticipated that the Supreme Court would interpret the statute to make admissible proof of prior convictions". Petitioners took the position that the statute did not permit such proof. A decision on the matter should have been anticipated. It is their claim that the Supreme Court made its holding that the statute did permit such proof and that such a decision is unprecedented in Michigan. This afterthought of petitioners is clearly an attempt to bring an additional ground of appeal by fitting the subject matter to the case of *Herndon vs. Georgia,* 295 U. S. 441, which they cite.

Petitioners here ask the Supreme Court to assume jurisdiction and overrule the state court's interpretation of the meaning of the Michigan statute. The prior arrests they say were not for similar acts; however, the acts aimed at under the conspiracy charge were exactly similar to those of which defendants had prior conviction, so similar that the tickets, route slips and name slips all bore the notation of the same policy house, that is, the Mexican Villa, so that they were in fact acts under the same type of conspiracy, probably even the same conspiracy, though not within the dates charged in the instant case.

Petitioners argue that evidence of prior conviction is only admissible in case defendants elect to testify.

Respondents concede that under common-law procedure, evidence of other crimes may only be used to *impeach* defendants who take the stand. But that common-law rule is not the same as the rule of evidence as to prior acts to show intent, plan or scheme, which rule of evidence is set up by the statute. That statute is applicable where there is the question of intent as repeated Michigan and other state court decisions show. Unlawful intent is, of course, the essence of the unlawful agreement which constitutes a conspiracy in Michigan. Where the offense is defined either as a lawful agreement to do unlawful acts or an unlawful agreement to do any act. In the instant situation, both agreement and objects were charged to be unlawful, and intent, therefore, most important.

Petitioners assert here for the first time that by the admission of evidence as to prior convictions before defendants took the stand, defendants were compelled to waive their privilege against self-incrimination, and that their rights, therefore, under Amendment Five were violated. This assertion is somewhat of a *non-sequitur*. Under Michigan decisions, and under the wording of the statute, evidence of prior acts is not limited to cases where defendants do testify. It is significant that petitioners offer no authority to support their claim here. Moreover, respondents point out that these petitioners *did not take the stand*, and, therefore, did not waive their rights against self-incrimination, even had their assertion been true. Respondents also add that if we accept petitioners' theory that a defendant is in effect compelled to take the stand by incriminating testimony of this type, it would be logical to add that any damaging testimony showing defendants' guilt would likewise be a violation of his

right against self-incrimination if he asserted his innocence, whether or not he took the stand.

To prove jurisdiction under this head petitioners cite the following cases: *Boyd vs. United States,* 116 U. S. 633; *Counselman vs. Hitchcock,* 142 U. S. 562; *In re Nachman,* 114 Fed. 995. These are all cases arising originally in the federal courts, and none of them present any reason for assumption of jurisdiction over state courts. No state actions are involved in any of the three cases.

Petitioners argue, too, that the Michigan Supreme Court's interpretation of "acts" to include "conviction of acts" should be reviewed. In the absence of the showing of a federal question, respondents do not believe that the United States Supreme Court will review a state court's interpretation of its own statute, not alleged to be unconstitutional. Particularly, since this question was not presented to the state court. Petitioners admit that they made no claim either in the trial or before the appellate court of a violation of their rights under the Fifth Amendment, because they say they did not anticipate the court's unprecedented interpretation of the statute. However, they had before them that interpretation when they filed their petition for a rehearing in the Michigan courts. If the decision did show a violation of such rights, it was certainly the duty of petitioners to present the question first to the Michigan Supreme Court for review. In the *Georgia* case, cited above, the court did not permit review, although the question had not been raised at the trial or on the appeal, as an exception to the general rule, because of the unexpected—and this was really an unexpected decision in that case. However, as soon as the decision came down, the defendants in the *Georgia* case promptly conserved their rights by

presenting the matter first to the Georgia Supreme Court, alleging "violation of constitutional rights." These petitioners had the same opportunity. The *Georgia* case is, therefore, not controlling. In addition to which it cannot truthfully be said that the Michigan Supreme Court's interpretation was either unprecedented or should not have been anticipated.

Third Federal Question

Under this heading petitioners assert denial of due process in the court's refusal to quash "all but one count of the information". Technically there was only one count. Assuming, however, that the fourteen paragraphs are actually separate counts instead of only other phases of the same continuing conspiracy, respondents point out that here, too, the cases cited by petitioners to sustain their claim of jurisdiction fail.

Petitioners cite *U. S. vs. Potter,* 56 Fed. 83. This was a prosecution under a federal check act. The decision was based on the wording of a specific federal statute, which was not followed in the indictment. The case bears no conceivable analogy to the case at bar, even if we were to concede, which we do not, that it is within the purview of the United States Supreme Court to assume jurisdiction over a state appellatet court's interpretation of its own rules of pleadings.

Another of petitioners' citations, *Fontana vs. United States,* 262 Fed. 283, deals with the sufficiency of an indictment in a federal case, attacked and reversed on the score of uncertainty. It, too, offers no precedent for a federal court's review of a state court's interpretation of the sufficiency of state pleadings. Petitioner cites also *Grosjean vs. American Press Company,*

297 U. S. 293, which is not concerned at all with the questions of pleadings as a denial of due process, but with the constitutionality of a particular state statute, sought to be enjoined as unconstitutional. It was held unconstitutional as a denial of the freedom of the press and, therefore, of due process.

The petitioners here complain that the indictment contained conflicting charges, and that it was not clear upon which charge the people would ultimately elect to stand, and that the multiplicity of charges had a prejudicial effect on the jury. Both the trial court and the appellate court held adversely to this contention, saying:

> "But it is also well settled that the people cannot be required to elect between counts where the offenses charged arose out of the same acts at the same time and the same testimony must be relied upon for conviction. *People vs. Warner,* 201 Mich. 547. See, also, *People vs. Marks,* 255 Mich. 271. The various sections of the penal code pertaining to gambling, under which the information is laid, may cover separate offenses, but we are not here concerned with separate offenses, as such, but rather with the identical charge in each count that defendants conspired and agreed together to violate each designated section of the penal code. By detailing each of the conspiracies separately, conviction (fol. 147) might properly follow on any one or all of the counts and result only in the conviction of the crime of conspiracy."

While lack of due process under the Fourteenth Amendment is a limitation which may apply in proper instances to state action, it does not empower a federal court to review the decision of state courts on the propriety of pleadings which are supported by repeated

state decisions, and which do not in fact on their face deprive defendants of due process. Here defendants were charged with conspiracy to do a number of illegal acts all concerned with gambling. It was immaterial whether they actually did any of these acts so long as there was evidence to sustain their agreement to do such acts. Significantly the cases cited under this head do not discuss the claim of petitioners here raised; they are not concerned at all with the alleged lack of due process in state courts.

Fourth Federal Question

Petitioners' discussion under this heading of the Fourth Federal Question is merely a reiteration of the preceding three, reasserting lack of due process and equal protection of the laws as violation of the Fourteenth Amendment. Petitioners cite *Powell vs. Alabama,* 287 U. S. 45, 77 L. Ed. 158, which held that conviction of murder of defendants who were not afforded actual opportunity to be represented by counsel was lack of due process. In that opinion there was discussed the gradual modification of earlier decisions, including specifically the *Hurtado* decision, 110 U. S. 516, which had held sweepingly that the first eight constitutional amendments were not included under the due process clause under the Fourteenth Amendment. Justice Sutherland reviewed the rule and pointed out that while it is generally held to constitutional interpretation, it must yield to more compelling considerations wherever they exist. This had been foreshadowed in the decision in *Twining vs. New Jersey,* 211 U. S. 78, 99. Essentially, the *Powell* decision so far as it discusses the question before us is summed up in syllabus 7, which reads:

> "While the fact that a right is specifically dealt with in another part of the federal constitution may be indicative that it is not embraced within the due process clause of the Fourteenth Amendment, such rule is merely had to construction and must yield to more compelling considerations whenever such considerations exist, as where the right is of such character that it cannot be denied without violating fundamental principles of liberty and justice."

Respondents point out that there are no such compelling considerations before us.

Petitioners also cite *Mooney v. Holohan,* 294 U. S. 112, 79 L. Ed. 794, which held that a conviction obtained by perjured testimony, known to the district attorney to be perjured, is lack of due process, since state courts equally with federal courts are under obligation to guard and enforce every right secured by the federal Constitution. Petitioners cite also *Snyder vs. Massachusetts,* 291 U. S. 97, 78 L. Ed. 674, wherein judgment of conviction of murder was affirmed. Significantly, the court wrote in that decision:

> "A state may regulate the procedure of its courts in accordance with its own conception of policy and fairness, unless it offends some principle of justice ranked as fundamental."

Certainly that description does not apply to the pleadings in the instant case. So, too, *Chambers vs. Florida,* 309 U. S. 227, 84 L. Ed. 716, which held, "due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept."

The rule then is well set up that any type of violation of the Federal Constitution which results in lack or absolute deprivation of due process may be a question to be considered by the United States Supreme

Court, under the theory of the Fourteenth Amendment, which does not mean the United States Supreme Court is willing to assume jurisdiction, and either review or overrule a state court's judgment of its own procedure each time that petitioners dissatisfied by state court action seek such review.

Petitioners claim here that the search was illegal, and that the use of the evidence obtained was illegal in spite of the Michigan statute, and that the Supreme Court's construction of that statute is illegal, or in violation of due process. However, despite the broadening tendency in the interpretation of the due process of the Fourteenth Amendment, petitioners point to no decisions upholding federal review of such questions as are here raised. In particular, they cite no decisions which subject the provisions of the Fourth Amendment forbidding search and seizure to the test of the Fourteenth, nor do they cite decisions so subjecting the Fifth Amendment, even if we assumed that that particular question was properly here raised, which we do not. Neither do petitioners cite any cases which permit review by the federal court of state court's interpretation of its own statute, where the constitutionality of such statute is not raised on the theory of lack of due process.

QUESTIONS PRESENTED

Respondents feel that there are actually no federal questions presented which sustain petitioners' right to review.

In respondents' opinion, the questions petitioners seek to present are more clearly worded as follows:

1 and 2. Will the United States Supreme Court issue a writ of certiorari to review a decision of a state court upholding a search and seizure by state officers as legal?

3. Will the United States Supreme Court review a state court's decision upholding the admissibility of certain evidence made admissible by a state statute?

4. Will the United States Supreme Court review a claim of alleged violation of constitutional rights under the federal constitution, Fifth Amendment, which admittedly was not raised until after the denial of a petition for re-hearing in the state court?

5. Can a state court's interpretation of its own rulings of evidence and pleadings amount to a denial of due process under the Fourteenth Amendment under the circumstances here presented?

To all of the above questions, respondents contend that the answer should be "No".

WHY REASONS RELIED ON BY PETITIONERS FOR ALLOWANCE OF THE WRIT ARE INSUFFICIENT

Petitioners contend that a state court has decided federal questions of substance not heretofore deter-

mined, and decided them in a manner contrary to the decisions of this court. Respondents deny this, deny either that the questions raised are questions of substance, that they are questions over which this court may assume jurisdiction, or that they are questions not heretofore decided. Respondents point out that no one of the federal cases cited by petitioners support the petitioners' theory of a right to review.

RELIEF

Respondents, therefore, respectfully submit that this petition for writ of certiorari to review the judgment of the Michigan Supreme Court in affirming conviction and denying rehearing should be denied.

Respectfully,

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